Response and Comment of the

Aerospace Industries Association
Contract Services Association
Government Electronics & Information Technology Association
Information Technology Association of America
National Defense Industrial Association
Professional Services Council

To the clarifications on recommendations by the Commercial Practices Working Group of the

Acquisition Advisory Panel

Provided via email on

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R-1 Definition of Commercial Services "Of a Type"

The Panel proposes to revise the regulatory definition of "commercial services," included in FAR 2.101 since 1995, to delete the phrase "of a type" in the first sentence, correctly asserting that the statute does not include this phrase. However, other related statutory provisions (such as the term "commercial item," "combination of commercial items," and "non-developmental item") each include the phrase "of a type" in their statutory definition, and that phrase was carried over into the regulatory coverage in FAR 2.101.

Removal of the phrase "of a type" overrides the holding of the Aalco Forwarding case[1] interpreting the regulatory definition of commercial services. If the phrase "of a type" is not included in the definition, agencies may limit the application of the term based on the extent of government regulations attached to them. Aalco specifically said that this was not a factor -- and found that moving services were of a type found in the private sector, notwithstanding the extensive DoD regulations that attached to them. GAO has found that determining whether a particular service is a "commercial service" is a determination largely within an agency's discretion.[2]

The Aalco rationale is the reason to keep in the phrase -- so that any service that has extensive government regulations attached will not lapse back into non-commercial status. Two examples that would be at risk are moving services and dental services (the TRICARE dental contract -- which was competed under FAR Part 12 because of Aalco and the regulatory definition). However, any service that has regulations attached could be at risk. Since the agency has wide discretion, there is no need to further constrain its authority to determine whether a particular acquisition qualifies as a "commercial service."

Parenthetically, the FAR Council recently rejected making this change; it closed FAR Case 2005-043 on April 12, 2006, concluding, "there was insufficient rationale to adopt the DoD proposed definition or otherwise clarify the meaning "of a type" as it relates to commercial items." (See FAR Cases Closed report, last visited 8/25/06).

R-4: New Competitive Services Schedule

Based on discussions with the Panel, it appears that the text of this Panel recommendation may have caused confusion in industry about the Panel's intent. It has

[1] Available at: http://archive.gao.gov/legald426p6/159471.pdf.
[2] Crescent Helicopters, B-284706 (5/30/00); SHABA Contracting, B-287430 (6/18/01)

been explained that the intent of the Panel was to clarify that at the contract formation stage, all Schedules, including the new proposed Information Technology Schedule contract for professional services, require prices along with other essential terms and conditions. Under current regulations, GSA contracting officers also require contractors to demonstrate the commercial basis for the prices and often negotiate final schedule prices to maximize the benefit for the government. In addition, once the prices are established in the contract, these prices operate as a ceiling for any agency order placed against this schedule. The Panel's intent appears to be that, for this new schedule only, prices would be included in the contract but the government would not impose external tests of commerciality and would not seek to negotiate prices at the contract formation stage. The Panel also proposes to address agency needs at the ordering stage by providing that, for this new schedule only, the prices that may be offered are not restricted to be at or below the ceiling prices established by the underlying schedule contract. With these clarifications, the Multi-Association Coalition does not oppose the recommendation. However, we recommend that this recommendation for a new professional services schedule not be limited to "information technology" professional services; GSA is seeking to avoid requiring agencies to artificially differentiate between "information technology" and "non-IT" schedules (including seeking legislation to combine the Supply Fund with the IT fund).

R-7: Protest of Task and Delivery Orders

Under current law[3] and regulations[4] no protest may be filed against any order placed against a multiple-award/IDIQ contract except for a protest that asserts that the order increased the scope, period or maximum value of the contract. Under limited circumstances, the Government Accountability Office has considered a protest based on the narrow additional ground that an agency restricted fair competition in making a down-select of offerors.[5] There are two essential elements of the total statutory scheme for the bar on protests. The first is that the contracting officer must provide each awardee[6] a fair opportunity to be considered for each order exceeding $2,500 issued under multiple delivery-order contracts, except for narrow exceptions provided for in the rules[7] and may not use any method that would not result in fair consideration being given to all awardees prior to placing the order. The second element serves as a safety valve in that the regulations require that each agency appoint an ombudsman to review complaints from contractors to ensure they are afforded a fair opportunity to be

[3] See dual conforming provisions in 10 USC 2304c(d) and 41 USC 253j(d).
[4] FAR 16.505(a)(9)
[5] Electro-Voice, Inc., B-278319, B-278319.2,(1/15/98), 98-1 CPD ¶ 23 (holding that the statutory restriction on protests of orders placed under task or delivery order contracts does not apply to protests of "down selections" implemented by the placement of a task or delivery order under a multiple award task or delivery order contract where the task order results in the elimination of one of the contractors from consideration for future orders under the remaining terms of the contract).
[6] FAR 16.505(b)(1)(i)
[7] FAR 16.505(b)(1)(ii)(B)

considered, consistent with the procedures in the contract.[8] Generally, even irregularities in the task order solicitation are not subject to protest at GAO, GSA or the Court of Federal Claims.[9] However, in Community Consulting, the Armed Services Board of Contract Appeals held that a contract clause assuring a fair opportunity to compete for task orders gave the ASBCA jurisdiction to hear a protest.[10] In addition, in L-3 Corporation, the ASBCA denied a government motion to dismiss a claim, noting that "There is as much a denial of a fair opportunity to be considered for award where the government does not follow the specified evaluation criteria as where it fails to solicit a bid…The same actions of the government in awarding a delivery order under a multiple award indefinite quantity contract may theoretically be grounds for both a 'protest' seeking to cancel or modify the award and a 'claim' for damages for breach of the Awarding Orders clause of the contract. These are separate and distinct forms of relief with 'protests' governed by FAR Subpart 33.1 and 'claims' by FAR Subpart 33.2."[11]

The Panel proposes to revise this statutory limitation by affirmatively permitting a protest against any task or delivery order over $5 million, believing that agencies must be held accountable for following these statutory and regulatory procedures. The Multi-Association Coalition remains opposed to the Panel's recommendation to re-open protests. Furthermore, we do not believe it necessary to revise the statute or the regulations to adopt the case law exceptions to the protest limitation. Nor do we support expanding the scope of protests beyond that created in statute and case law. However, if the Panel wanted to codify the current case law, the Panel could revise the dual conforming statutes by adding the underlined text below so as to provide:

> A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that (1) the order increases the scope, period, or maximum value of the contract under which the order is issued, (2) the agency has failed to provide a fair opportunity to be considered for the award of an order; or (3) the government does not follow the specified evaluation criteria for an order."

R-8: Pricing When No or Limited Competition Exists

Based on discussions with the Panel, it appears that the text of this Panel's recommendation may have caused confusion among industry about the Panel's intent. It appears that the Panel is actually seeking to include in FAR Part 12 only the current statutory and regulatory coverage for pricing commercial items as exists in the other parts of the FAR (notably Part 15), without substantive change. The Panel has provided the text of the proposed FAR Part 12 language to achieve this.

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[8] FAR 16.505(b)(5)
[9] See A&D Fire Protection, Inc., COFC 06-467C (8/10/06)
[10] Community Consulting Int'l, ASBCA 53489, 02-2 BCA 31940 (8/2/02)
[11] L-3 Corporation, ASBCA 54920 (7/27/06)

At the Multi-Association Coalition's January 31, 2006 presentation to the Panel, we indicated that, while we did not find the current regulatory process confusing, and there is a FAR drafting convention that seeks to minimize duplicating provisions wherever possible, we did not object to reinforcing in FAR Part 12 all of the existing authorities available to a contracting officer in evaluating circumstances when no or limited competition exists.

If the intent of the Panel (as opposed to the text of the recommendation) is accurate, the Multi-Association Coalition is now reviewing the proposed FAR Part 12 language provided by the Panel to determine if it meets this revised goal.